

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARIA FERNANDEZ, MARIA SOLEDAD
CHAVEZ, and BERTHA MENDOZA, as
individuals and on behalf of all
other similarly situated persons,
and

PRISCILLA ERAZO, SILVIA GONZALES,
OLGA MERCADO, CARMELA RAMIREZ,
ROSALINDA RAMIREZ, and ROSA MARIA
REYEZ,

Plaintiffs,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES; ROBIN ARNOLD-WILLIAMS,
in her official capacity; KENNETH
HARDEN and JOHN BUMFORD, in their
official and individual capacity;
ROBIN CLAWSON, MICHAEL COYNE,
JAMES DITZEL, ISRAEL VARGAS, KRIS
BONESS, DON SMITH, JUDY ESSER,
RANDALL BLACKBURN, STEVE JENSEN,
DAVID MATNEY, JANE DOES 1-5, and
JOHN DOES 1-5, in their individual
capacities; GRANT COUNTY,
Washington and TOWN OF MATTAWA,
Washington,

Defendants.

NO. CV-05-0280-EFS

**ORDER GRANTING PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION AND DENYING
STATE DEFENDANTS' MOTION
TO DEFER CLASS
CERTIFICATION AND SET
PARAMETERS FOR PRE-
CERTIFICATION DISCOVERY**

A hearing was held in the above-captioned matter on November 8,
2005, to hear Plaintiffs' Motion for Class Certification (Ct. Rec. 83)

1 and State Defendants' Motion to Defer Class Certification and Set
2 Parameters for Pre-Certification Discovery (Ct. Rec. 76). Appearing on
3 behalf of Plaintiffs were Ty Duhamel and Joachim Morrison. John
4 McIlhenny appeared on behalf of State Defendants. After reading the
5 submitted materials and relevant law and considering the arguments of
6 counsel, the Court, as explained below, grants Plaintiffs' motion and
7 denies Defendants' motion.

8 Named class representatives Maria Fernandez, Maria Chavez, and
9 Bertha Mendoza ask the Court for an order allowing the matter to proceed
10 as a class action, including both a larger class and a sub-class, under
11 Federal Rules of Civil Procedure 23(a) and (b)(2). State Defendants
12 concede the numerosity and commonality requirements of Rule 23(a) are
13 satisfied but oppose class certification, contending (1) the class
14 definition and certification will serve no useful purpose given that the
15 Court's legal constitutional rulings will apply to all persons regardless
16 of whether the action is treated as an individual action or as a class
17 action, (2) the typicality requirement is not met, and (3) the adequacy
18 of representation requirement is not met. First and foremost, State
19 Defendants submit they need additional time to pursue limited
20 certification discovery prior to the Court ruling on the certification
21 hearing.

22 The party seeking class certification has the burden of proving the
23 requirements of Rule 23(a) and other prerequisites are met. *Hanon v.*
24 *Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). This burden must
25 be sufficiently carried so that the court can "form a reasonable judgment
26

1 on each requirement." *Campion v. Credit Bureau Servs., Inc.*, 206 F.R.D.
2 663, 673 (E.D. Wash. 2001). Rule 23(a) provides:

3 [o]ne or more members of a class may sue or be sued as
4 representative parties on behalf of all only if (1) the class
5 is so numerous that joinder of all members is impracticable,
6 (2) there are questions of law or fact common to the class, (3)
7 the claims or defenses of the representative parties are
8 typical of the claims or defenses of the class, and (4) the
9 representative parties will fairly and adequately protect the
10 interest of the class.

11 If the Court finds these requirements are satisfied, Rule 23(b)(2)
12 provides that a suit may be maintained as a class action if: "[t]he party
13 opposing the class has acted or refused to act on grounds generally
14 applicable to the class, thereby making appropriate final injunctive
15 relief or corresponding declaratory relief with respect to the class as
16 a whole." "The determination of class action status rests within the
17 sound discretion of the district court." *James v. Ball*, 613 F.2d 180,
18 192 (9th Cir. 1979), *rev'd on other grounds by* 451 U.S. 355 (1981).

19 Given that State Defendants concede Rule 23(a)'s numerosity and
20 commonality requirements are met on the face of the pleadings, the
21 remaining issues are whether (a) further discovery should occur prior to
22 class certification, (b) typicality exists, (c) the adequate
23 representation requirement is satisfied, and (d) whether Rule 23 contains
24 a "necessity" requirement.

25 A. Motion to Defer

26 The Court does not find it necessary to defer class certification
in order for Defendants to conduct the requested discovery. See *Kamm v.*
Cal. City Dev. Co., 509 F.2d 205 (9th Cir. 1975). The Court finds
Plaintiffs have presented sufficient information for the Court to form
a reasonable judgment on whether the requirements of Rule 23 are

1 satisfied and discovery by the State Defendants into the requested
2 matters will not be of assistance to the Court's determination of whether
3 certification is appropriate. See *Campion*, 206 F.R.D. at 673.

4 B. Typicality

5 Rule 23(a)(3) requires the claims or defenses of the named
6 representatives be typical of the claims or defenses of the class in
7 order to assure that the representatives' interests are aligned with the
8 class. *Jordan*, 669 F.2d at 1321; *Scott v. Univ. of Del.*, 601 F.2d 76,
9 85 (3rd Cir. 1979). The test of typicality "is whether other members
10 have the same or similar injury, whether the action is based on conduct
11 which is not unique to the named plaintiffs, and whether other class
12 members have been injured by the same course of conduct." *Armstrong v.*
13 *Davis*, 275 F.3d 848, 869 (9th Cir. 2001); *Campion*, 206 F.R.D. at 673. The
14 claims of the representative plaintiffs need not be identical to the
15 claims of the class, but rather the claims are typical if they are
16 reasonably co-extensive with those of the absent class members. *Hansen*
17 *v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003).

18 The Court finds the typicality requirement is satisfied. The
19 Complaint alleges there were approximately fifty subpoenas issued to
20 Mattawa family home child care providers to produce years of copies of
21 business records. (Compl. ¶ 82.) The alleged standard practice of the
22 Department of Social and Health Services ("DSHS"), or more specifically
23 the Department of Fraud Investigations ("DFI"), is to demand entry into
24 the day care and to demand copies of business and personal records
25 without advising the day care operator of the right to refuse consent to
26 search or to contact an attorney, and Plaintiffs seek relief from this

1 conduct. (Compl. ¶¶ 130-137.) If this is a standard operating practice,
2 then all class members are potentially subject to the same course of
3 conduct. Based on the allegations in the Complaint, the Court finds the
4 typicality requirement is satisfied because there are other members,
5 other than the named representatives, who have the same alleged injury
6 and this injury is based on DSHS/DFI's conduct which is not unique to
7 the named representatives. See *Armstrong*, 275 F.3d at 869.

8 C. Adequately Protect the Class

9 The fourth Rule 23(a) prerequisite is "the representative parties
10 will fairly and adequately protect the interests of the class." FED. R.
11 CIV. P. 23(a)(4). The following inquiries are critical to the
12 determination of whether this requirement is satisfied: (1) do the
13 representative plaintiffs and their counsel have any conflicts of
14 interest with other class members and (2) will the representative
15 plaintiffs and their counsel prosecute the action vigorously on behalf
16 of the class. *Hanlon*, 150 F.3d at 1020. The representative plaintiffs
17 should have no interest antagonistic to those of the class. *Campion v.*
18 *Credit Bureau Servs., Inc.*, 206 F.R.D. 663, 674 (E.D. Wash. 2001).

19 Defendants contend the class representatives may have a conflict of
20 interest with the class because they were served with Notices of
21 Overpayment by DSHS and encumbered by pending administrative action by
22 the state to recover overpayments allegedly made to them and, thus, the
23 class representatives will be preoccupied with the overpayment issue.
24 According to the State Defendants, Maria Fernandez owes \$4,762.85, Bertha
25 Mendoza owes \$966.40, and Maria Chavez owes \$22,664.25. (Decl. Bashaw ¶
26 5.) These repayment claims were withdrawn by DSHS without prejudice at

1 the request of the Assistant United States Attorney for the Eastern
2 District of Washington; however, the State Defendants contend they have
3 six years in which to refile these claims.

4 The Court finds the current record does not show a conflict of
5 interest between the class representatives and the class because the
6 Notices of Overpayment were withdrawn and, thus, are no longer pending.
7 Regardless, even if they are reinstated, the Court finds the
8 administrative actions will not so preoccupy the class representatives
9 so that a conflict of interest occurs, but rather it is likely the
10 existence of an administrative proceeding against these individuals by
11 DSHS would encourage the class representatives and their counsel to more
12 zealously act on behalf of the class in this action.

13 State Defendants do not contest the competence of counsel, but
14 maintain that because Columbia Legal Services represented the proposed
15 class representatives during the administrative procedures that a
16 conflict of interest may exist. Again, the Court does not find that
17 representation of these individuals during the administrative procedures
18 creates a conflict of interest. Thus, the Court finds the class
19 representatives and Columbia Legal Services will adequately represent the
20 interests of the class and subclass.

21 D. Necessity

22 State Defendants submit the Court must find class certification is
23 necessary. Plaintiffs respond a "need requirement" is not contained
24 within Rule 23. The Court agrees with Plaintiffs' interpretation of Rule
25 23 and concludes a finding of necessity is not required; rather, the
26

1 Court need only find the four Rule 23(a) requirements and Rule 23(b) (2)
2 is satisfied in this instance.

3 The Court reaches this conclusion based on the clear language of
4 Federal Rule of Civil Procedure 23. Rule 23 clearly sets forth the
5 required findings a court must make prior to certifying a class action
6 and "necessity" is not a listed requirement. The Ninth Circuit has a
7 detailed discussion of Rule 23 in a footnote in *Zepeda v. INS*, 735 F.2d
8 719, 729 n.1 (9th Cir. 1983), indicating that class certification is
9 appropriate even though the requested relief could be obtained on an
10 individual lawsuit basis. In addition, a district court in the Western
11 District of Washington commented in *Smith v. University of Washington Law*
12 *School*, 2 F. Supp. 2d 1324, 1344 (W.D. Wash. 1998), "[t]here is no
13 specific requirement in Rule 23(b) (2) that the Court consider need in
14 determining whether to certify an injunctive class. The focus, instead
15 is on whether the defendants have acted or refused to act on grounds
16 generally applicable to class of persons." 2 F. Supp. 2d at 1344. Based
17 on the clear wording of Rule 23 and these two cases decided in the Ninth
18 Circuit, the Court concludes the two cases cited by State Defendants on
19 this point, *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684,
20 686 (6th Cir. 1976),¹ and *Ihrke v. Northern States Power Co.*, 459 F.2d
21 566, 572 (8th Cir. 1972), *vacated and remanded to dismiss as moot*, 409
22 U.S. 815 (1972), are incorrect on this principle and, given that they do
23 not discuss the source of a "necessity" requirement in detail, but merely
24 state that one exists, are not well-reasoned decisions on this point.

25
26 ¹ The Sixth Circuit in *Craft* cited to *Ihrke* for the proposition
that necessity is a requirement. 534 F.2d at 686.

1 E. Rule 23(b) (2)

2 The Court also finds Plaintiffs have adequately alleged the State
3 Defendants "acted or refused to act on grounds generally applicable to
4 the class, thereby making appropriate final injunctive relief or
5 corresponding declaratory relief with respect to the class as a whole."
6 FED. R. CIV. P. 23(b) (2). Accordingly, the Court finds certifying a class
7 action in this lawsuit serves the purpose of efficiency and economy of
8 litigation given that any legal ruling by the Court in this class action
9 will clearly apply to all of DSHS's conduct, and not simply against
10 DSHS's conduct in regards to the three named class representatives.

11 F. Counsel

12 Plaintiffs ask the Court to appoint Columbia Legal Services as
13 counsel for the class and LEP subclass under Rule 23(g). Rule
14 23(g) (1) (A) provides the " . . . court that certifies a class must
15 appoint class counsel." In making the determination of whether counsel
16 will "fairly and adequately represent the interests of the class" the
17 court must consider:

- 18 • the work counsel has done in identifying or investigating
19 potential claims in the action,
- 20 • counsel's experience in handling class actions, other
21 complex litigation, and claims of the type asserted in
22 the action,
- 23 • counsel's knowledge of the applicable law, and
- 24 • the resources counsel will commit to representing the
25 class.

26 FED. R. CIV. P. 23(g) (1) (C) (i). In addition, the court may consider other
matters pertinent to this determination. *Id.* at 23(g) (1) (C) (ii).

Defendants concede Plaintiffs' counsel are competent to bring such
an action. Based on the declarations submitted by Plaintiffs' counsel
Gregory Provenzano, Ty Duhamul, and Joachim Morrison, the Court finds

1 these individuals with Columbia Legal Services will fairly and adequately
2 represent the interests of the class, given that each counsel has handled
3 several class actions-- some against DSHS--, have experience representing
4 clients who are Spanish speaking, are knowledgeable on the applicable
5 law, and have the resources to commit to representing the class.
6 Accordingly, the court appoints Columbia Legal Services as counsel for
7 the class and subclass

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Plaintiffs' Motion for Class Certification (**Ct. Rec. 83**) is
10 **GRANTED**. This action is certified for Rule 23(b)(2) class and subclass
11 resolution.

12 2. State Defendants Motion to Defer Class Certification and Set
13 Parameters for Pre-Certification Discovery (**Ct. Rec. 76**) is **DENIED**.

14 3. Pursuant to Rule 23(c)(1)(B),

15 a. The class is defined as "all persons who currently are or
16 in the future are licensed by the Department of Social
17 and Health Services to provide family home child care
18 services." The class issues are:

- 19 i. whether R.C.W. §§ 74.15.030, 74.15.050, 74.15.060,
20 and 74.15.080 and W.A.C. §§ 388-296-0450 and 388-
21 296-0520 violate Article 1 § 7 of the Washington
22 Constitution because they authorize entries into
23 homes without restriction as to time, scope, place,
24 or manner;
- 25 ii. whether the policies and practices of DSHS, Ms.
26 Arnold-Williams, and Mr. Bumford fail to comply with

1 Article 1 § 7 of the Washington Constitution and the
2 Fourth and Fourteenth Amendments to the United
3 States Constitution;

4 iii. whether a permanent injunction should be entered
5 requiring DSHS, Ms. Arnold-Williams, Mr. Bumford,
6 and all successors and agents of each to comply with
7 Article 1 § 7 of the Washington Constitution and the
8 Fourth and Fourteenth Amendments to the United
9 States Constitution;

10 iv. whether a permanent injunction should be entered
11 requiring DSHS, Ms. Arnold-Williams, Mr. Bumford,
12 and all successors and agents of each to prohibit
13 DSHS investigators from demanding immediate entry
14 into licensed family home child care providers
15 without a warrant;

16 v. whether a permanent injunction should be entered
17 requiring DSHS, Ms. Arnold-Williams, Mr. Bumford,
18 and all successors and agents of each to prohibit
19 DSHS investigators from demanding immediate
20 production and removal of original documents from
21 licensed family home child care providers without a
22 warrant;

23 vi. whether a permanent injunction should be entered
24 requiring DSHS, Ms. Arnold-Williams, Mr. Bumford,
25 and all successors and agents of each to advise
26 licensed family home child care providers of their

1 right to counsel and an opportunity to quash or
2 limit a subpoena duces tecum;

3 vii. whether a permanent injunction should be entered
4 requiring DSHS, Ms. Arnold-Williams, Mr. Bumford,
5 and all successors and agents of each to prohibit
6 non-DSHS law enforcement persons to accompany DSHS
7 staff on criminal investigations of family child
8 care providers involving searches and seizures
9 without a warrant ; and

10 viii. whether a permanent injunction should be entered
11 requiring DSHS, Ms. Arnold-Williams, Mr. Bumford,
12 and all successors and agents of each to prohibit
13 DSHS from investigating the immigration matters
14 family child care providers and their family
15 members.

16 b. The subclass is defined as "all limited English
17 proficient ("LEP") persons who currently are or in the
18 future are licensed by Department of Social and Health
19 Services to provide family home child care services." The
20 subclass issue is whether a permanent injunction
21 requiring DSHS, Ms. Arnold-Williams, Mr. Bumford, and all
22 successors and agents of each to translate crucial legal
23 documents into the primary language of the LEP family
24 child care providers should be entered.

25 4. Pursuant to Rule 23(g), the Court appoints Columbia Legal
26 Services as class counsel.

DATED this 15th day of November, 2005.

ORDER ~ 12